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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 204

GEORGE CHRISOS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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GEORGE CHRISOS,
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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on June 7, 1961.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 8.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 7, 1961 (Appendix, infra, p. 15). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTION PRESENTED.

Whether it was prejudical for a trial court, hearing the case without a jury, to hold the case under advisement for a period of 3½ months before decision, and in the interim to examine and read a probation report on the prosecuting witness, a prostitute, where the credibility of such witness was the issue in the case for the court to decide, and where such report was not made available to the petitioner.

RULE INVOLVED.

Rule 32 (c) (1), F. R. Cr. P.:

> "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."

STATEMENT.

Petitioner and a co-defendant were tried to the District Court, jury having been waived, on an indictment charging them with having, on March 18, 1959, persuaded, induced, enticed and coerced one Mrs. Denise Stewart to go from East St. Louis, Illinois, to Terre Haute, Indiana, for the purpose of prostitution, in violation of 18 U. S. C. 2422 (R. 4-5). After conclusion of the evidence, on February

11, 1960, the Court took the case under advisement until May 26, 1960, at which time it acquitted the co-defendant and found the petitioner guilty (R. 142). After hearings on a motion for a new trial, the Court, on August 2, 1960, sentenced petitioner to imprisonment for four years (R. 169, 175).

The evidence adduced by the Government at the trial was principally that of the prostitute, Mrs. Denise Shayne Berry Stewart, who had been convicted on the Monday (two days) before the instant trial began in the same Court on a forged check charge, and was awaiting sentence (R. 27). After the instant trial, but before petitioner's conviction, she was placed on probation by the Court (R. 151). Thereafter, on a motion for a new trial in the instant case, she recanted most of her testimony incriminating the petitioner (R. 145-154).

At the trial, Mrs. Stewart, an experienced prostitute (R. 23-26, 45), testified that she met the petitioner and his co-defendant in December 1958 when she went to work as a barmaid at a nightclub in East St. Louis, Illinois, which they operated (R. 7-8). She further testified that around March 1959, she discussed with the petitioner and the co-defendant going to Terre Haute, Indiana, to work there as a prostitute and that they told her of such arrangements and who would meet her there (R. 13-20, 29, 31, 32, 34); that a few days later, the petitioner gave her about $40.00 and they told her that someone would meet her at the train station in Terre Haute (R. 15, 32); that she was then driven by the petitioner or the co-defendant from her motel to downtown East St. Louis where she took a cab to the train station in St. Louis, Missouri, whence she proceeded alone by train to Terre Haute, Indiana (R. 13-15, 34-35). There, so she testified, she was met by one "Bernie" Hansback who took her to the Sandison Hotel (R. 15, 33); she worked at the hotel for one Jeanette (Tiny) Hartman (common law wife of Hansback

[R. 42, 51, 92]) as a prostitute for about two months (R. 15, 16, 33) during which time Mrs. Stewart visited St. Louis several times and on one occasion the petitioner and co-defendant visited her in Terre Haute (R. 16-17, 43). She further testified that she gave part of her earnings to the petitioner (R. 17-18).

The petitioner's testimony and evidence contradicted that of Mrs. Stewart. He testified that Mrs. Stewart told him that she had heard from one Josephine Giovando, a madame who owned the Alibi Club in East St. Louis, and worked prostitutes there (R. 75-76), about the job in Terre Haute and that she knew Bernie Hausback (R. 117-119). (Prior thereto Hausback had seen Mrs. Stewart at the Alibi Club and discussed her with Josephine [R. 75-76].) Petitioner told her that she would have to go alone (R. 117-118). Petitioner drove Mrs. Stewart from his club to her motel, but did not see her for several days prior to her departure for Terre Haute (R. 119). The co-defendant later told petitioner that he had driven Mrs. Stewart to downtown East St. Louis when she departed for Terre Haute (R. 120). Petitioner gave Mrs. Stewart no money to go to Terre Haute and received none of her earnings (R. 119-121).

Petitioner's testimony was corroborated by that of the co-defendant (R. 96-110) and others (R. 75-76, 92-93).

As stated, the case was taken under advisement by the Court on February 11, 1960 and the Court found the petitioner guilty and the co-defendant not guilty on May 26, 1960.

In the interim the Court had placed Mrs. Stewart on probation on the conviction involving forged checks (R. 151), at which time it examined a pre-sentence probation report which was never made available to petitioner (R. 164-166).

The Court below stated:

> "The Government's case was largely based upon the testimony of the prosecuting witness, Denise Shayne Berry. Her story of defendant's participation in preparing and arranging for her trip to Terre Haute was in sharp conflict with defendant's version. Defendant strongly attacked the veracity and credibility of the prosecuting witness by an examination of her background, which most charitably described, was unsavory. In these circumstances, the defendant contends it was reversible error for the trial court to read and examine a pre-sentence report compiled by federal probation officers dealing with the witness' background and character. Defendant argues that reading this report must have unfairly swayed the trial judge in his assessment of the credibility of the prosecuting witness. This report came into the hands of the court after the prosecuting witness had been found guilty in a separate case in which she was charged with unlawfully transporting a forged check in interstate commerce. The report was filed with the court while the instant case was under advisement."

REASON FOR GRANTING THE WRIT.

It was prejudicial for the trial court, hearing this case without a jury, to hold the case under advisement for a period of 3½ months before decision, and in the interim to examine and read a probation report on the prosecuting witness, a prostitute, where the credibility of such witness was the issue to be decided by the court, and where such report was not made available to the petitioner.

Of course, defense counsel does not know what was in the probation report. Since the Court placed Mrs. Stewart

on probation, it appears likely that it was unjustifiably favorable to her in view of her background as disclosed by the record in the instant case, which, as the Court below stated, "most charitably described, was unsavory." Since her credibility was the principal issue at the trial, such report obviously was prejudicial to the petitioner. Further, it undoubtedly dealt with the facts of the instant case, that is, Mrs. Stewart's prostitution at Terre Haute. It very likely contained hearsay and other evidence inadmissible at the trial. It seems significant that there was little difference between the evidence with respect to the co-defendant and petitioner concerning the Terre Haute trip. Cases such as this, involving the uncorroborated testimony of a prostitute, should be approached with caution (cf. **Hamilton v. U. S.**, 140 F. 2d 679, 680 [D. C. Cir.]; **Hawkins v. U. S.**, 288 F. 2d 122 [D. C. Cir.], concurring opinion) particularly where the witness is awaiting sentence and expects to receive light treatment by giving testimony favorable to the Government. See **Gordon v. United States**, 340 U. S. 414, 417, 73 S. Ct. 369, 372.

Of course, we cannot prove prejudice under the standards required by the opinion below because we are denied access to the probation report.

Even where the Court is not trying the facts, such a report on the defendant in a case "shall not be submitted to the Court * * * unless the defendant has pleaded guilty or has been found guilty" [Rule 32 (c) (1), F. R. Crim. P.]. A violation of this rule is presumed to be prejudicial to the rights of the defendant. **Smith v. United States**, 360 U. S. 1, 17, 79 S. Ct. 991, concurring opinion.

There was no necessity for the Court to hold the instant case under advisement for three and one-half months while becoming exposed to the probation report in Mrs. Stewart's case. Propriety and justice required a decision in the instant case **before** examining the probation report

in Mrs. Stewart's case. We believe the unnecessary examination by the trial court of the probation report before deciding the instant case was plainly prejudicial to the rights of the petitioner and he should have been granted a new trial.

CONCLUSION.

For the reasons stated hereinabove, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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408 Olive Street,
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Counsel for Petitioner.

OPINION.

In the
United States Court of Appeals
for the Seventh Circuit.

September Term, 1960—April Session, 1961.

No. 13177

United States of America, Plaintiff-Appellee, v. George Chrisos, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois

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June 7, 1961.

Before Hastings, Chief Judge, Duffy and Knoch, Circuit Judges.

Hastings, Chief Judge. Defendant George Chrisos was convicted in a trial before the court without a jury for a violation of the provisions of Title 18, U. S. C. A., § 2422.[1] He appeals from this judgment of conviction.

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[1] "§ 2422. Coercion or enticement of female.

Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or possession of the United States, for the purpose of prostitution

The trial court made the following findings as to Chrisos' conduct and guilt:

> "The evidence clearly shows and the court finds that Denise Shayne Berry was a prostitute; that she was known by various aliases, one of which was Joyce Allen; that she and [defendant and a third party] met prior to her trip to Terre Haute, Indiana, and that both [defendant and the third party] transported her to various cities in the State of Illinois for the purpose of prostitution; that the defendant George Chrisos gave her money with which to purchase a railroad ticket to go from East St. Louis, Illinois, to Terre Haute, Indiana; that defendant Chrisos, in fact, took her to a taxi stand in East St. Louis, Illinois, from whence she departed to Terre Haute, Indiana, to work as a prostitute; that she did go to and work in Terre Haute, Indiana, as a prostitute. The evidence establishes that the relationship of prostitute and panderer existed between the girl and the defendant George Chrisos.
>
> • • •
>
> "The Government proved beyond a reasonable doubt that Denise Shayne Berry went from East St. Louis, Illinois, to Terre Haute, Indiana, as charged in the indictment, and that she did so because of the defendant George Chrisos' express desire and induce-

or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or for any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in inter-state or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 812."

> ment. * * * The evidence proves beyond a reasonable doubt that the defendant George Chrisos induced her to go to Terre Haute for the purpose of prostitution as charged in the indictment and furnished the money therefor."

Defendant makes no contention that such findings are not supported by sufficient evidence.

The Government's case was largely based upon the testimony of the prosecuting witness, Denise Shayne Berry. Her story of defendant's participation in preparing and arranging for her trip to Terre Haute was in sharp conflict with defendant's version. Defendant strongly attacked the veracity and credibility of the prosecuting witness by an examination of her background, which most charitably described, was unsavory. In these circumstances, the defendant contends it was reversible error for the trial court to read and examine a pre-sentence report compiled by federal probation officers dealing with the witness's background and character. Defendant argues that reading this report must have unfairly swayed the trial judge in his assessment of the credibilty of the prosecuting witness. This report came into the hands of the court after the prosecuting witness had been found guilty **in a separate case** in which she was charged with unlawfully transporting a forged check in interstate commerce. The report was filed with the court while the instant case was under advisement.

Rule 32 (c) (1), F. R. Cr. P., which deals with presentence reports, states:

> "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its con-

tents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."

In a recent concurring opinion, Mr. Justice Clark in Smith v. United States, 360 U. S. 1, 11 (1959), stated that the presentation to the trial court of a pre-sentence report concerning a **defendant** "must be deemed presumptively prejudicial where, in violation of Fed. Rules Crim. Proc., 32(c)(1), it was conducted prior to the plea."

Defendant attempts to extend the reasoning of this concurring opinion to a situation where, as here, a pre-sentence report dealing with a **witness** came into the possession of the trial court pursuant to its responsibilities in a totally separate case. We have been cited no cases which state that, as a matter of law, such inspection and examination must be deemed presumptively prejudicial. This rule is properly limited to a report dealing with the defendant, for a premature presentation there might influence the controlling determination of the guilt of the defendant. Further, defendant's attempt to show some semblance of prejudice in fact was totally unsuccessful. We have carefully read defendant's argument before the trial court and in his briefs in this court and fail to find any possible connection between the facts he states might hypothetically be contained in the confidential report and the trial court's assessment of the veracity of the prosecuting witness. Since there was no showing of any actual prejudice, we shall not presume as a matter of law that it did exist.

Defendant next contends that the provisions of the "Jencks Act," 18 U. S. C. A., § 3500, were not complied with in the case below because the court failed to order production of a certain FBI report. During the course of cross-examination of the prosecuting witness, it was revealed that she had made certain statements to agents of the Federal Bureau of Investigation assigned to the

case. Her testimony was ambiguous as to the number of oral and written statements she had made.[2] Defendant's counsel properly moved for the production of all statements made by this witness to any agency of the United States. The trial court then noted, "Let the record show the handing of such statements to counsel for the defense by the United States Attorney." Defense counsel next moved for production of any memorandum made by any FBI agent as a result of conversations with the prosecuting witness. The government attorney replied that "[t]o my knowledge, that's the only statement we have [• •] taken from this witness referring to this case."

In order to determine whether or not the prosecuting witness had made subsequent statements to the FBI, defense counsel, **at the suggestion of government counsel**, called Agent Hafen who was in charge of the investigation of the case. This conversation clearly indicates that on one occasion a statement signed by the prosecuting witness was taken by Agent Hafen. **This statement, or a copy of it, was the one furnished defense counsel pursuant to his "Jencks" request**, supra. The testimony further indicates that an FBI report was made by Agent Hafen based on this discussion, but that it contained only a copy of the written statement and, in addition, a description of the prosecuting witness and the location of the discus-

[2] "Q. [By defense counsel] How many statements did you make to them? A. [By the prosecuting witness] I think two altogether.
"Q. How many statements have you made? A. Two.
"Q. You made a statement to the FBI about this matter, did you not? A. Yes.
"Q. When? A. I can't give you the exact date.
"Q. Can you give us the approximate date? A. I think the 9th of September—December, I mean.
"Q. 9th of December? A. I think that's about the day.
"Q. Since that time, you have made no statement to any FBI agent about this case? A. Oral or signed?
"Q. Either? A. I may have discussed it.
"Q. But you don't know? A. I could not be positive."

sion.[3] Thus it is apparent from the extrinsic testimony that there was but a single statement of the prosecuting witness and that it had already been furnished to counsel. The trial court continued this fact when it stated during the argument on defendant's motion for a new trial that "the testimony shows there was no other statement." This conclusion is reaffirmed by the fact that defense counsel made no request for additional statements at the conclusion of the testimony of the agent who had been called to determine if "any other statements" had been made. On the contrary, the prosecuting witness was immediately recalled, and defense counsel continued his cross-examination.

If the testimony had revealed that additional statements had been made by the prosecuting witness or that agents' memoranda had been compiled on the basis of additional conversations, then production should have been ordered

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[3] "Q. [By defense counsel] As a result of these discussions did you make a memorandum of what was said during these discussions? A. [By Agent Hafen] On the one occasion, yes.

"Q. Do you know what that one discussion was? A. The day we took the signed statement.

"Q. In addition to that, did you make any other memorandum of what was said during that conversation with her or those conversations with her? A. Not that I recall.

"Q. You prepared an official report for your office in Springfield, for the Springfield office? A. Yes, sir.

"Q. Was that report in respect to the conversations

* * *

"A. It was the statement she furnished to us.

"Q. Was that based on a verbal report? A. Yes, sir.

* * *

"Q. Is there anything else in there about the discussion between yourself and Miss Berry? A. Pertaining to this case?

"Q. Yes. A. I believe that is all.

"Q. What is in that report concerning this case? A. State that again, please.

"Q. The only thing you did was copy off on a written report this written statement? A. Description of her in there in addition to the places, I believe.

"Q. That's all you stated? A. I believe so.

"Mr. Baker. That's all."

if the document met the requirements of a "statement" within 18 U. S. C. A., § 3500 (e). Such further determination was not necessary here since the single statement that existed was already in the hands of the defense.

In its proper use of extrinsic testimony to determine the existence of additional statements, the trial court has here complied with the statutory mandate of Section 3500 which, as the Supreme Court has said, "implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute—the interest of the Government in safeguarding government papers from disclosure, and the interest of the accused in having the Government produce 'statements' which the statute requires to be produced." Campbell v. United States, 365 U. S. 85, 95 (1961).

The final three arguments of defendant can be treated summarily. Alleged improper cross-examination of defendant was not objected to by trial counsel. Our examination of the record indicates there was no "plain error" in this respect within the terms of Rule 52(b), F. R. Cr. P. The record discloses no indication that defendant was prejudicially limited in cross-examining the prosecuting witness. Finally, the court's general findings of guilt, in the absence of any request by defendant for special findings, are ample to support the court's verdict.

The judgment of the district court is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT.

United States Court of Appeals
for the Seventh Circuit,
Chicago 10, Illinois.

Wednesday, June 7, 1961.

Before Hon. John S. Hastings, Chief Judge; Hon. F. Ryan Duffy, Circuit Judge; Hon. Win G. Knoch, Circuit Judge.

United States of America, Plaintiff-Appellee, No. 13177 vs. George Chrisos, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 204.

GEORGE CHRISOS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

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OCTOBER TERM, 1961.

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GEORGE CHRISOS,
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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

ARGUMENT.

The issue here is whether the reading by the court, trying the case without a jury, of a probation report on the prosecuting witness was prejudicial to petitioner, requiring a new trial. The Government's answer is that we failed to show that the report contained prejudicial information (Br. Op. pp. 10-11). Yet the Government concedes that, since the report is confidential, defense counsel could not see it (Br. Op. p. 10), citing **Williams v. New**

York, 337 U. S. 241, 245. How then can we show prejudice? What we did in our petition was to point up some of the information usually contained, as the Government knows, in such reports. And if it did contain those usual things—as it likely did—we believe it was clearly prejudicial to the petitioner. Surely we are not expected to show what the report contains when we are denied access to it.

We do not claim that Rule 32 (*c*) (1) applies to the instant case. But since the reading of such a report by the court is prejudicial to a defendant being tried by a jury, *a fortiori*, the reading of such a report by the court on the prosecuting witness is prejudicial to a defendant being tried by the court, where "The Government's case was largely based upon the testimony of the prosecuting witness" (Opinion below, Pet. p. 10). The self-serving testimony of the Madame, who concededly was Hausback's East St. Louis contact in procuring a prostitute, supplied little, if any, corroboration of the prostitute's testimony (R. 49-61).

The Government also claims that the prejudice was caused by defense counsel in requesting 15 days to file a trial brief (Br. Op. p. 9).[1] To complete the logic, it points to Rule 32 (a) requiring the imposition of sentence without unreasonable delay. But we see nothing in that rule which impelled the court to sentence the witness before deciding the instant case. She had entered a plea of guilty only two days before the instant trial (R. 26-27) and she was not confined (R. 7). Indeed, the court placed her on probation (R. 151). Under such circumstances, we doubt that the court felt that she would complain of a short delay in imposing such sentence.

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[1] There is nothing unusual in the fact that a brief was not filed. For such a request is frequently made to give counsel time to determine whether a brief would be helpful to his client. The case was ready for argument and decision on February 26.

When the court examined the probation report, it knew that it had the instant case pending for decision. We submit again that propriety and justice required a decision in the instant case before examining such report, and we reassert, as we did in the court below, that such examination was prejudicial to the rights of this petitioner, requiring a new trial (See Opinion below, Pet. pp. 10-11).

For the reasons stated in the petition and herein above, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 204

GEORGE CHRISOS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 8-14) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1961 (Pet. 15). The petition for a writ of certiorari was filed on July 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In this prosecution for a violation of the Mann Act, petitioner waived a jury trial. After the trial, at which the woman involved, a prostitute, had testified as a government witness and petitioner had denied her incriminating testimony, and before the trial judge had made his finding as to guilt, he received and examined a pre-sentence report relating to the woman, who had pleaded guilty to an unrelated charge in another case. The question is whether the judge's examination of this report in connection with the other case was improper and prejudicial to petitioner so as to disqualify the judge from proceeding further in petitioner's case.

RULE INVOLVED

Rule 32, F. R. Crim. P.:

> (a) *Sentence.* Sentence shall be imposed without unreasonable delay. * * *
>
> * * * * *
>
> (c) *Presentence Investigation.*
>
> (1) *When made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of the sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> (2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant,

and such other information as may be required by the Court.

STATEMENT

Petitioner and a codefendant, Aristotle Gatzoulis, were charged with inducing a woman to go by interstate common carrier from East St. Louis, Illinois, to Terre Haute, Indiana, for the purpose of prostitution, in violation of 18 U.S.C. 2422 (R. 4). After waiving a jury trial, they were tried before the District Court for the Eastern District of Illinois, which acquitted Gatzoulis but found petitioner guilty and sentenced him to imprisonment for four years (R. 142, 173-174). The court of appeals affirmed (Pet. 8-14). The evidence may be summarized as follows:

The offense involved a sixteen year old girl, most frequently referred to in the evidence as "Joyce" (R. 23).[1] She had been a prostitute before any of the events hereafter described took place, and continued to work as such thereafter (R. 24, 28-29, 45). Early in 1959, she went to work as a barmaid for petitioner and Gatzoulis, who operated the Cleo Club in the East St. Louis area (R. 7-8).

In February 1959, Bernard Hausback, the manager of the Sandison Hotel in Terre Haute, Indiana, saw Joyce in the Alibi Lounge, also in the East St. Louis area. He asked the owner of the building occupied by the Alibi Lounge, Mrs. Giovando, if she had anybody working—meaning, as he put it, as a prostitute (R. 49, 51-52, 75-76). Mrs. Giovando testified that peti-

[1] The indictment named her as Denise Shayne Berry (R. 4). As a witness she gave her name as Denise Shayne Berry Stewart, stating that she had been married about a year previously, following which she immediately separated from her husband (R. 7, 22-23).

tioner told her about this time that Joyce was "a waitress at the Cleo" and was "looking for work" (R. 49-50). On a Sunday in March, Hausback was again at the Alibi Lounge, together with Jeanette Hartman, the owner of the Sandison Hotel in Terre Haute. Mrs. Giovando introduced petitioner to them, telling them that they were looking for a girl to work in Terre Haute (R. 54). Jeanette Hartman asked petitioner if he knew of anyone who was looking for work as a prostitute. He told her he would let her know if he heard of anyone (R. 64-68).

A few days after this meeting with Hausback and Jeanette Hartman at the Alibi Lounge (see R. 52, 64), petitioner talked with Joyce and told her she was going to Terre Haute and that she would work as a prostitute. He told her who would meet her and what arrangements had been made. Joyce had never previously had any contact with anybody in Terre Haute. Petitioner gave her thirty-five or forty dollars and drove her to East St. Louis, where she took a cab to St. Louis (R. 12-15, 20-21). This was the only money she had and she spent it on her train fare (R. 19). In the meantime, petitioner had Mrs. Giovando call Jeanette Hartman at the Sandison Hotel in Terre Haute and tell her that Joyce would be there at ten o'clock (R. 52-53, 66, 72).

Joyce went by train from St. Louis to Terre Haute, where she was met by Hausback. He took her to the hotel where she worked as a prostitute for about six weeks (R. 15-16, 62-63, 76). Part of her earnings she kept for herself, part went to Jeanette Hartman, and the balance went to petitioner (R. 17, 33). Petitioner had Mrs. Giovando make another call to Terre

Haute with respect to Joyce, approximately a week after she had left East St. Louis (R. 53). He and the co-defendant Gatzoulis visited Joyce in Terre Haute while she was there (R. 19).

Petitioner, testifying in his own behalf, stated that he first met Joyce at another establishment in November 1958, and that she asked to go to work for him as a prostitute (R. 111-112). Later, she came to the Cleo Club with a hard luck story and looked as though she had been struck. Petitioner felt sorry for her and let her stay around there for two or three days and gave her some money. Still later, she worked as a prostitute in Centralia and Quincy, Illinois (R. 81, 113-115). After that, she worked at Grace's Tavern in the East St. Louis area (R. 116). Petitioner recalled the meeting at the Alibi Lounge with Hausback and Jeanette Hartman. He testified that he told them that Joyce could go to work for them if she wanted to, but that he would not send her any place (R. 117). Subsequently, Joyce told him that she wanted to go to Terre Haute. He told her that if that was what she wanted "she would go alone" (R. 118-119). Petitioner further testified that he did not drive Joyce to East St. Louis or give her money for the trip, nor did he receive any of her earnings while she was in Terre Haute (R. 119-121).

At the conclusion of the testimony on February 11, 1960, counsel for defendants moved for a judgment of acquittal. In response to the court's question, counsel said he would like to file a brief. The court granted defendants fifteen days in which to file their brief, with the government to have ten days to answer and defendants to have five days thereafter to reply. No briefs

having been filed,[2] the court set the matter down for oral argument on May 3, 1960. On May 26, the court found petitioner guilty and the co-defendant Gatzoulis not guilty, filed a memorandum of findings of fact and conclusions of law, and directed a pre-sentence investigation as to petitioner (R. 141-142, 175-181).

Petitioner duly filed a motion for new trial (R. 143-144). One of the grounds was newly discovered evidence consisting of an affidavit of Joyce in question and answer form (R. 185-196). In this she stated that the thirty-five or forty dollars she received from petitioner was a personal loan and that he may not have known that she needed the money for the trip to Terre Haute, following which she said that petitioner knew why she needed it (R. 189). She learned about the "job" in Terre Haute from petitioner some days before she made the trip. He told her of the conversation he had had with the people operating the Sandison Hotel in Terre Haute, and she told petitioner to make the arrangements for the job (R. 191-192). Petitioner did make the arrangements "[t]o a certain extent" (R. 195). She was positive she paid him back the thirty-five or forty dollars (*ibid.*). "To the best of [her] memory" at the time she made the affidavit, it was Gatzoulis who drove her to East St. Louis (R. 194).

At the hearing on the motion for new trial on July 6, 1960, Joyce testified that she had told petitioner's counsel that morning she could not remember whether

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[2] The implication from the record that no briefs were filed (R. 2, 142) is substantiated by a letter from the United States Attorney, dated July 14, 1961, which states that no briefs were filed, but that petitioner's trial counsel, at the time of oral argument, filed a paper entitled "Webster's New International Dictionary Second Edition, Unabridged (1951)", in which the words persuade, induce, entice and coerce were defined. See R. 141.

petitioner or Gatzoulis gave her the money for the trip (R. 149). On cross examination, she testified that she believed that petitioner had given her the money, but she could not remember exactly. She thought Gatzoulis had taken her to the cab stand in East St. Louis, Illinois, but she could not be sure (R. 152). She "believed" she had a discussion with petitioner about driving her to St. Louis, Missouri, to take the train to Terre Haute. He declined to drive her because that would involve "crossing a State line." Instead, she was driven to East St. Louis, whence she took a cab to St. Louis (R. 153-154). Petitioner might have thought of the thirty-five or forty dollars as a loan; she testified that she "sarcastically said I'll pay you back." He never pressed her. She gave him her earnings in Terre Haute, "except [her] living expenses" (R. 162-163).

Another ground for the motion for a new trial was that, at the time the court considered the evidence and made its finding of guilty, it had before it a pre-sentence report concerning Joyce which "might or could have unintentionally and unconsciously influenced this Court * * * particularly in considering and determining the weight to be given to [her] testimony" in this case (R. 184).[3] In arguing this point at the hearing, counsel stated that the report may have dealt with Joyce's activities as a prostitute in St. Louis before she went to the East St. Louis area. He said that petitioner had testified that Joyce had worked in a colored house of prostitution in St. Louis; that Joyce had denied this; and that if the pre-sentence report on Joyce adverted

[3] Shortly before the trial of the instant case, Joyce had pleaded guilty in the same court to a charge of interstate transportation of a forged check (R. 26-27, 151, 164-167).

to this matter it might have influenced the court to believe that petitioner, "at least on this point, was a liar on the background of the girl over at the hotel in St. Louis" (R. 164-165). The court pointed out that petitioner had testified that Joyce had told him that her husband had placed her in a colored house and that she had jumped out the window; that he was only repeating what Joyce had told him. The court stated that it was at a loss to understand why the report on Joyce should touch on this matter or how it could influence the court (R. 165-166).

The court took the motion under advisement until August 2, 1960, when it was denied and sentence was imposed upon petitioner (R. 169-174). In a memorandum opinion, the court pointed out that, as a witness on the motion for a new trial, Joyce "corroborated" her testimony at the trial and that, far from showing that her trial testimony was false or confused, her later testimony was "merely repetitious and cumulative." The court noted that although she testified at the trial that petitioner drove her to the cab stand in East St. Louis and later testified that she was not sure but thought that Gatzoulis drove her, the finding of guilty was based upon the whole series of acts. The court held that, even if it were to be assumed that Gatzoulis drove Joyce, "this would not have been sufficient to overcome other corroborated evidence presented at the trial" (R. 196-199).

ARGUMENT

Here, as in the court of appeals, petitioner makes no contention that the trial court's finding of guilty is unsupported by the evidence. His sole contention is that he was somehow prejudiced by reason of the fact that the trial judge had available a pre-sentence report on Joyce, in relation to another case, in the interim between the conclusion of the petitioner's trial on February 11, 1960, and the judge's decision on May 26, 1960, finding him guilty (Pet. 5-6).

In this connection, he asserts for the first time in this Court that the judge was remiss in failing to decide his case sooner and before he looked at the report on Joyce (Pet. 6-7). But the delay was largely attributable to the defendants' trial counsel, not the court. At the conclusion of the testimony on February 11, the court deferred decision on the issue of guilt at the defendants' request and gave counsel fifteen days to file a brief. No brief was filed, with the result that the court set the matter for oral argument. Argument was heard on May 3 and the court rendered its decision, accompanied by written findings of fact and conclusions of law, on May 26.

The court did not err in its handling of the other case, involving a charge that Joyce had transported interstate a forged check, to which she had pleaded guilty shortly before the instant case was tried. The court was required by Rule 32(a), F. R. Crim. P., *supra*, pp. 2-3, to impose sentence upon her without unreasonable delay and in performing this duty it was proper for the court to receive and examine the pre-sentence report of the probation service, in accordance with the provisions of Rule 32(c)(1). By obeying the prescriptions of the rule in the other case the court did

not violate it in this case. Petitioner points to that part of Rule 32(c)(1) which provides that a pre-sentence report shall not be submitted to the court prior to a plea or finding of guilty. But by its terms this provision obviously applies only to a pre-sentence report dealing with a defendant whose guilt has not yet been determined; it had no application, in petitioner's pending case, to the pre-sentence report dealing with Joyce in the separate and distinct case in which she had pleaded guilty. Neither has petitioner any cause to complain that he has never seen this report. A defendant has no right to see even a pre-sentence report on his own record and background. See *Williams* v. *New York*, 337 U.S. 241, 245.

Finally, petitioner's attempt to show prejudice is as unconvincing here as it was to the court of appeals (see Pet. 11). He argues that, since the trial court granted Joyce probation and since "her credibility was the principal issue at the trial," the report was "obviously" prejudicial to him (Pet. 5-6); that it must have dealt with the "facts of the instant case, that is [Joyce's] prostitution at Terre Haute"; and that it "very likely contained hearsay and other evidence inadmissible at the trial" (Pet. 6). This is sheer speculation. The trial court was at a loss to understand defendants' counsel's attempt to explain how the court might have been prejudiced by the report to believe Joyce and disbelieve petitioner and stated, in effect, that the report had had no influence on its decision finding petitioner guilty (see p. 8, *supra*). The present attempt to point out other possible ways in which the report may have prejudiced petitioner is equally unavailing. Furthermore, as the trial court pointed out in its memorandum opinion denying the

motion for a new trial, the issue of petitioner's guilt did not turn, as petitioner would have it, solely on the relative credibility of Joyce and petitioner, for her testimony was corroborated by other evidence (see, *e.g.*, the testimony of Mrs. Giovando summarized at pp. 3-5, *supra*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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